

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

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STB Docket No. MC-F-21008

EAST WEST RESORT TRANSPORTATION, LLC,  
AND TMS, LLC, d/b/a  
COLORADO MOUNTAIN EXPRESS  
-PETITION FOR DECLARATORY ORDER-  
MOTOR CARRIER TRANSPORTATION OF PASSENGERS IN COLORADO

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COLORADO PUBLIC UTILITIES COMMISSION'S  
MOTION FOR EXTENSION OF TIME TO FILE  
VERIFIED REPLY STATEMENT TO CME'S OPENING EVIDENCE

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Dated: April 1, 2005

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

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VERIFIED REPLY STATEMENT TO CME'S OPENING EVIDENCE

The Public Utilities Commission of the State of Colorado ("CPUC"), by and through the Colorado Attorney General, respectfully moves the Board for an extension of time within which to file its reply to the opening evidence filed by East West Resort Transportation, LLC, and TMS, LLC, d/b/a Colorado Mountain Express ("CME"). CPUC makes this motion in response to the Board's Decision served March 21, 2005 and pursuant to 49 C.F.R. § 1104.7(b). In support, CPUC states as follows:

1. By ordering paragraph 1 of the Board's March 21, 2005 decision instituting a declaratory order proceeding ("March 21, 2005 Decision"), the Board granted CPUC's October 14, 2004 petition to intervene, and the CPUC became a party to this docket. It was

upon receipt of the March 21, 2005 Decision that all parties, including CPUC, first learned of the Board's procedural schedule for this docket. As to the CPUC, the Board established April 11, 2005 as the deadline for CPUC to file its reply to CME's opening evidence.

2. The content of CME's opening evidentiary statement and the language of the Board's March 21, 2005 Decision raise many issues to which the CPUC desires to respond. Because of the way that CME and the Board have framed this declaratory order proceeding, the issue of whether CME does in fact operate as a *bona fide* interstate, regular route common carrier of passengers by motor vehicle has become relevant.

3. As CME specifically states in its Petition for Declaratory Order, the purpose of the petition is to further CME's belief that the United States District Court for the District of Colorado in Civil Action No. 04-B-0105 "would be aided greatly in having the views of the Board, construing in the first instance the preemption provision of section 14501(a) in the light of CME's passenger transportation operations." CME Petition at 9.<sup>1</sup>

4. The bulk of the evidence submitted by CME to support its petition consists of documents and verified statements submitted for the purpose of establishing that CME was, during the 2003 time period at issue, providing substantial, *bona fide*, and actual regularly scheduled interstate service. In this regard, CME is asserting that approximately 24.1% of its passengers were transported in interstate commerce and that 75.1% of its passengers were

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<sup>1</sup> On March 4, 2005, in Civil Action No. 04-B-0105, the United States District Court for the District of Colorado took oral argument related to legal briefs filed between September 30, 2004 and November 26, 2004 on, *inter alia*, a motion filed by CME on September 30, 2004 (*i.e.*, after filing its petition for declaratory order with the Board). CME's September 30, 2004 motion requested the U.S. District Court to stay its proceedings pending construction of 49 U.S.C. § 14501(a) in the first instance by the Board. As of the date of this motion for extension, the U.S. District Court has not yet issued its decision on CME's motion.

“walk-ups” transported in intrastate commerce. CME Petition, Affidavit of Jay R. Ufer at ¶ 11. It should be noted that CME’s ground transportation offerings occur wholly within the borders of Colorado and, therefore, CME itself does not provide service between a State and a place in another State.<sup>2</sup>

5. Moreover, the Board’s March 21, 2005 Decision appears to assume that there will be no dispute regarding the nature of CME’s passenger transportation operations. In actuality, CPUC disputes CME’s conclusion that the facts set forth in the verified statements that accompany its petition demonstrate that its passenger transportation operations are substantially interstate in nature.

6. Because the Board has only recently made CPUC a party to this matter on March 21, 2005, CPUC has not had a reasonable opportunity to conduct discovery related to the facts relied upon by CME in its petition. While CPUC possesses some documents supporting its views, much of this material was acquired during informal negotiations with CME in the course of CME’s U.S. District Court action and, as such, cannot be submitted as verified and would likely be treated as inadmissible by the Board. Furthermore, CPUC has not had the opportunity to depose the four persons who supplied verified statements in support of CME’s petition. CPUC is, therefore, presently without sufficient verifiable material and sworn statements concerning CME’s operations to submit a verified reply

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<sup>2</sup> CPUC makes mention of this fact because proving *bona fide* operations is necessarily more complicated when the motor carrier must rely on proof of a nexus to interstate commerce rather than actual vehicular State-to-another-State border crossings. CPUC does not dispute that federal law permits, if certain characteristics are present, a motor carrier to conduct interstate operations even when it operates wholly within the borders of a single state.

statement addressing: (1) whether CME's operations are regularly scheduled<sup>3</sup> or (2) whether the third parties who arrange vacation packages actually arrange a substantial number of combined air and land packages (as opposed to intrastate, land-only packages)<sup>4</sup>. CPUC also notes that obtaining a clearer understanding of the statements referenced in footnotes 3 and 4 cannot be accomplished through means independent of discovery. Under the presently existing circumstances, CPUC cannot specifically challenge, in a verified statement, all of CME's allegations and, thus, is at risk of being considered to have admitted to the truth of certain of CME's material allegations of fact pursuant to 49 C.F.R. § 1112.6. In order to allow the Board to consider a complete record, and in order to permit a fair process for all parties involved, the Board should modify the established procedural schedule so as to provide for the opportunity to conduct discovery in this matter.

8. CPUC should similarly be provided an opportunity to conduct discovery to determine the source of such petition statements as "CPUC . . . commenced an enforcement proceeding against CME, charging CME with having carried passengers on its vehicles at rates not on file with the CPUC and having collected fares other than those prescribed by

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<sup>3</sup> See CME Petition, Affidavit of Jay R. Ufer at ¶ 4 (service is provided approximately hourly depending on season) and ¶ 6 (CME's service is provided immediately before or after the passenger boards or disembarks from an airplane); CME Petition, Affidavit of Bruce Rosard at ¶ 3 (CME's "schedules and operations are oriented to aircraft operations").

<sup>4</sup> See CME Petition, Affidavit of Jay R. Ufer at ¶ 7 (person "can", not must, arrange an entire vacation package); CME Petition, Affidavit of Jay R. Ufer at Document Appendix, Exhibit 15 (ground transportation by CME or car rental is an "option"); CME Petition, Affidavit of Mark Uhlfelder at ¶ 1 (S&L Travel Partners' packages generally consist of lodging and lift tickets and "often", but not always, include air and ground transportation); CME Petition, Affidavit of Mark Uhlfelder at ¶ 3 (admission that S&L Travel Partners customers may purchase land only packages); CME Petition, Affidavit of Bruce Rosard at ¶ 2 (Moguls' packages "typically", but not exclusively, include airfare combined with land options, including CME ground transportation); CME Petition, Affidavit of Christopher Jarnot at ¶ 2 (Vail's travel component packages "may, and often do" include airline tickets combined with land options, including CME ground transportation); CME Petition, Affidavit of Christopher Jarnot at ¶ 3 (admits that customers may have purchased their airline tickets from other sources).

CPUC, in violation of Colorado regulatory law.” See CME Petition at p. 6 (and quoted verbatim by the Board in its March 21, 2005 Decision). CPUC disputes this statement given the content of its January 30, 2004 pretrial witness list and copies of exhibits that it filed with the Public Utilities Commission of the State of Colorado in the stayed CPUC civil enforcement proceeding and that it served on CME and CME’s attorney. (Excerpt appended as Attachment 1).<sup>5</sup>

8. Finally, CPUC should be provided an opportunity to conduct discovery to determine the source of such petition statements as “CPUC contends that CME is not conducting interstate operations [seemingly because of the relative absence of through ticketing or common arrangements directly with air carriers]” and “CPUC evidently relies upon [various Interstate Commerce Commission decisions].” CME Petition at 9. Given that CPUC had filed no legal briefs or other statements regarding its view of CME’s circa 2003 operations as of the filing of CME’s petition on September 24, 2004, CPUC finds these statements curious at best.

9. CPUC’s above link between discovery and fairness was made because CPUC believes that, if the Board ultimately issues a declaratory order on the merits of CME’s petition and the applicability of 49 U.S.C. § 14501(a), such declaratory order will likely have a significant nationwide impact on the transportation of passengers by motor carrier.

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<sup>5</sup> The complete version of Attachment 1, which will be appended to CPUC’s verified reply statement, includes, *inter alia*, 16 web page print outs – one for each violation listed in the CPUC’s Civil Penalty Assessment Notice (Attachment 17 to CME’s Document Appendix). For purposes of this motion, one web page print out has been included as representative of the others.

Specifically, CPUC believes that a declaratory order issued in this docket could have impacts well beyond CME and the CPUC's enforcement action alleging a harm to the public as a result of CME advertising/offering rates different than its filed rates. This is especially true if the Board intends to use this docket to establish a new definition of through ticketing and/or common arrangement or a different level of interstate operations required to meet the "substantiality" element necessary to provide intrastate service on an interstate route. Given this potential, CPUC respectfully requests that the Board not attempt to reach a decision by adhering to the established procedural schedule, which schedule does not provide a reasonable opportunity for discovery consistent with procedures set forth at 49 C.F.R. 1114.21-.31 (*e.g.*, allowing 15 days for interrogatory responses pursuant to 49 C.F.R. 1114.26(a)).<sup>6</sup>

10. Only upon completion of discovery will CPUC be in a position to prepare and file a verified reply statement that fully and comprehensively responds to the contestable assertions in CME's opening statement, including those assertions and statements referenced above. Without discovery, the board will severely limit CPUC's ability to verify any different opinion that it might have regarding, for example, the substantiality of CME's interstate passenger transportation operations.

11. This is the CPUC's first request for an extension in this proceeding. Further, the undersigned is the only attorney assigned to this matter; Assistant Attorney General John

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<sup>6</sup> By its request here, CPUC does not suggest or imply that the use of the Board's modified procedures (49 C.F.R. 1112.1-.11) is inappropriate; rather CPUC contends that a less expeditious procedural schedule should be established with the framework of the Board's modified procedures.

Roberts, who previously entered his appearance in the CPUC enforcement action (and who executed Attachment 1) and U.S. District Court Civil Action No. 04-B-0105, no longer works on matters involving the Colorado Public Utilities Commission and is no longer available to work on this matter.

12. CPUC did not conduct discovery between September 24, 2004 and March 21, 2005, because, prior to March 21, 2005, it did not have party status in this matter. Further, CPUC believes that, in light of the expeditious procedural schedule set forth in the Board's March 21, 2005 Decision, the Board did not contemplate that discovery would be necessary in this proceeding. For this reason, CPUC believes that it is prudent for CPUC to delay the propounding of its initial discovery until after the Board rules on this motion. Hopefully, upon consideration of the statements contained in this motion, the Board will reexamine the need for discovery in this matter and reach a different conclusion.

13. CPUC also submits that because the enforcement proceeding before the Public Utilities Commission of the State of Colorado is stayed, no harm will be incurred by CME if the Board lengthens the procedural schedule in this matter.

14. To provide a reasonable opportunity to conduct discovery and allow for response times to interrogatories and document production requests and the scheduling and conducting of depositions, CPUC respectfully requests that the due date for its verified reply statement be set 120 days from the date of the Board's order on this motion.

15. The undersigned counsel has consulted with Mr. Tom Burke, counsel for CME, regarding the contents of this motion. CME does not consent to this motion.

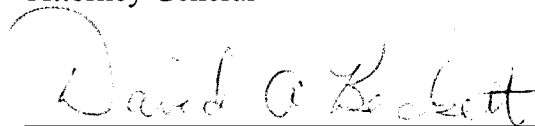


16. CPUC is aware that, under 49 C.F.R. § 1112.2, the filing of this motion does not automatically delay the established procedural schedule and, therefore, requests a prompt ruling from the Board with respect to the matters raised herein.

WHEREFORE, the Colorado Public Utilities Commission requests that the Board grant this motion for extension so that the Colorado Public Utilities Commission may conduct discovery necessary to prepare a reply statement verified consistent with the requirements of 49 C.F.R. § 1112.2 and to avoid the consequences of 49 C.F.R. § 1112.6. In this regard, CPUC requests that its verified reply statement be due 120 days from the date of the Board's order on this motion.

Dated this 1<sup>st</sup> day of April, 2005.

JOHN W. SUTHERS  
Attorney General



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DAVID A. BECKETT, 23098\*  
Assistant Attorney General  
Business and Licensing Section

Attorneys for the Public Utilities Commission of  
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Fax: (303) 866-5395  
\*Counsel of Record

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

Docket No. 03G-472CP

Civil Penalty Assessment Notice No.28339

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PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Complainant,

v.

EAST WEST RESORT TRANSPORTATION, LLC, dba COLORADO MOUNTAIN EXPRESS, and/or CME PREMIER, and/or PREMIER VIP TRANSPORTATION, and/or RESORT EXPRESS, a/k/a COLORADO MOUNTAIN EXPRESS, LLC,

Respondent.

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**STAFF OF THE COLORADO PUBLIC UTILITIES COMMISSION'S  
INITIAL WITNESS LIST AND COPIES OF EXHIBITS**

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Staff of the Public Utilities Commission of the State of Colorado (Staff), through its counsel, the Colorado Attorney General, submits its initial witness list, copies of exhibits, and notice of possible exhibits in the above-captioned docket, in accordance with Decision No. R04-0007-I.

**I. WITNESSES**

Staff may call the following witnesses:

- A. Gary Gramlick  
Transportation Rate/Financial Analyst  
Colorado Public Utilities Commission  
1580 Logan Street, OL-1  
Denver, Colorado 80203  
(303) 894-2870

Mr. Gramlick is expected to testify about Staff's investigation of Respondent's advertised passenger transportation rates for scheduled service on September 29-30, 2003, Respondent's Commission-approved tariff, and Staff's issuance of Civil Penalty Assessment Notice No. 28339-CPAN to Respondent. Mr. Gramlick will sponsor any and all exhibits Staff may offer for admission at the hearing, including, but not limited to, the exhibits listed below.

- B. Any witness necessary for rebuttal or impeachment.
- C. Any witness endorsed by any other party.
- D. Any witness unknown at this time but identified to the parties at least five (5) days prior to hearing.

## **II. EXHIBITS**

Staff may seek admission of the following exhibits:

- A. Civil Penalty Assessment Notice or Notice of Complaint to Appear No. 28339-CPAN (CPAN No. 28339).
- B. U.S. Postal Service Return Receipt, signed by Nancy Graves on October 10, 2003.
- C. Respondent's Passenger Tariff, as adopted effective August 5, 2003 through a series of adoptions (Aspen Limousine Service, Inc. d/b/a Vans to Vail, Inc. and Vans to Breckenridge, Inc. Colorado PUC No. 12 (effective November 22, 1995)).
- D. Colorado Mountain Express (CME) internet web page printout listing rates for transportation from Denver International Airport to "Keystone, Breckenridge, Copper Mtn. & Surrounding Areas," dated September 29, 2003.

E. CME internet web page printout listing rates for transportation from Denver International Airport to “Vail Valley & Beaver Creek (Selected Door to Door Service),” dated September 29, 2003.

F. CME internet web page printout listing rates for transportation from Denver International Airport to Glenwood Springs, dated September 29, 2003.

G. CME internet web page printout listing rates for transportation from Denver International Airport to “Aspen & Snowmass Areas (Selected Door to Door Service),” dated September 29, 2003.

H. CME internet web page printout listing rates for transportation from “Aspen & Snowmass Areas (Selected Door to Door Service)” to “Vail Valley & Beaver Creek (Selected Door to Door Service),” dated September 29, 2003.

I. CME internet web page printout listing rates for transportation from “Aspen & Snowmass Areas (Selected Door to Door Service)” to Glenwood Springs, dated September 29, 2003.

J. CME internet web page printout listing rates for transportation from “Aspen & Snowmass Areas (Selected Door to Door Service)” to “Eagle Airport – Arriving/Departing on Commercial Airline,” dated September 29, 2003.

K. CME internet web page printout listing rates for transportation from Glenwood Springs to “Vail Valley & Beaver Creek (Selected Door to Door Service),” dated September 29, 2003.

L. CME internet web page printout listing rates for transportation from Denver International Airport to “Keystone, Breckenridge, Copper Mtn. & Surrounding Areas,” dated September 30, 2003.

M. CME internet web page printout listing rates for transportation from Denver International Airport to “Vail Valley & Beaver Creek (Selected Door to Door Service),” dated September 30, 2003.

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Q. CME internet web page printout listing rates for transportation from “Aspen & Snowmass Areas (Selected Door to Door Service)” to Glenwood Springs, dated September 30, 2003.

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S. CME internet web page printout listing rates for transportation from Glenwood Springs to “Vail Valley & Beaver Creek (Selected Door to Door Service),” dated September 30, 2003.

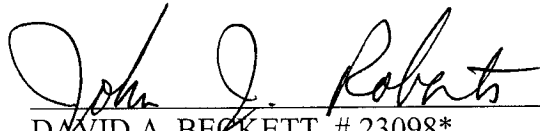
T. Any exhibit or document provided or obtained in response to any data request or in response to discovery.

- U. Any exhibit necessary for cross-examination, redirect examination, rebuttal or impeachment.
- V. Any exhibit necessary for identification or foundation.
- W. Any exhibit offered and/or endorsed by any other party.
- X. Any exhibit not known at this time, disclosed to the parties at least five (5) days prior to hearing.
- Y. Such other and further exhibits or documents as may become necessary and/or relevant during the course of this proceeding.

DATED this 30th day of January 2004.

Respectfully submitted,

KEN SALAZAR  
Attorney General

  
\_\_\_\_\_  
DAVID A. BECKETT, # 23098\*  
JOHN J. ROBERTS, # 30124\*  
Assistant Attorneys General  
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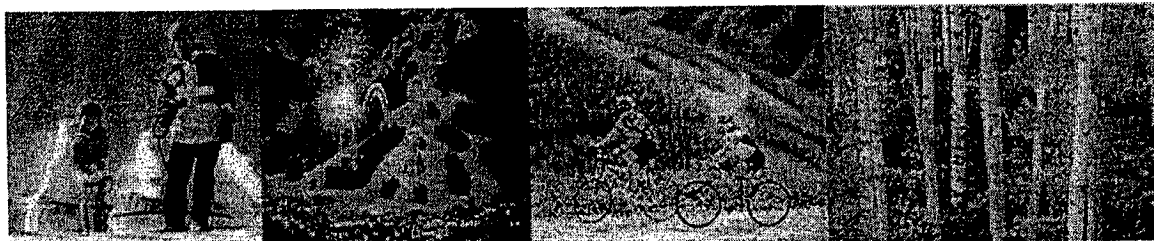
Attorneys for Staff of the Colorado Public Utilities  
Commission

\*Counsel of Record

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\*Private chauffeured travel, maximum 3 guests.  
\*Complementary bottled water

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\*Service provided by Premier VIP Transportation





\*Private chauffeured travel, maximum 5 guests.

\*VCR and complementary movies onboard  
\*Complementary bottled water



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SURROUNDING AREA**

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\*Private chauffeured travel, maximum 8 guests.  
\*Individual seats  
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within STAFF OF THE COLORADO PUBLIC UTILITIES COMMISSION'S INITIAL WITNESS LIST AND COPIES OF EXHIBITS upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, or as otherwise indicated, at Denver, Colorado, this 30th day of January 2004, addressed as follows:

East West Resort Transportation, LLC  
dba Colorado Mountain Express  
P.O. Box 580  
Vail, CO 81658

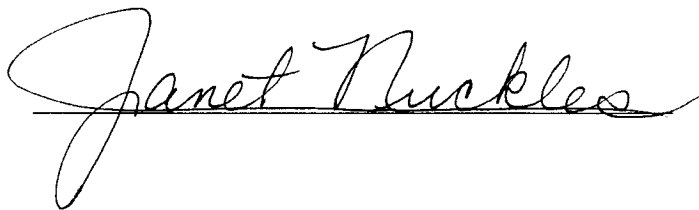
Thomas J. Burke, Esq.  
JONES & KELLER, PC  
World Trade Center  
1625 Broadway, 16<sup>th</sup> Fl.  
Denver, CO 80202

**\*\*Gary Gramlick**  
Public Utilities Commission  
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Office Level 2  
Denver, CO 80203  
BY INTERDEPARTMENTAL MAIL

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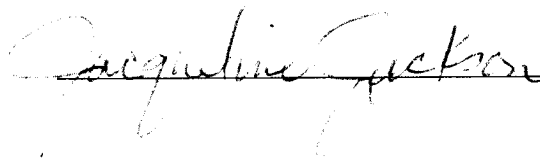
  
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within COLORADO PUBLIC UTILITIES COMMISSION'S MOTION FOR EXTENSION OF TIME TO FILE VERIFIED REPLY STATEMENT TO CME'S OPENING EVIDENCE upon all parties herein by electronic mail and depositing copies of same in the United States mail, first class postage prepaid, or as otherwise indicated, at Denver, Colorado, this 1<sup>st</sup> day of April, 2005, addressed as follows:

Thomas J. Burke Jr.  
Jones & Keller  
1625 Broadway, Suite 1600  
Denver, CO 80202

Fritz R. Kahn  
Fritz R. Kahn P.C.  
1920 N Street NW 8<sup>TH</sup> Floor  
Washington, DC 20036-1601

A handwritten signature in cursive script, appearing to read "Jacqueline Jackson", written over a horizontal line.